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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1948

No. 726

RUBY JEAN GRANNIS AND THE BRANCH BANKING AND TRUST COMPANY, FAYETTEVILLE, NORTH CAROLINA, ADMINISTRATORS OF THE ESTATE OF EDWARD W. GRANNIS, DECEASED, KARL SLOAN AND WILLIAM R. JONES,

Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, the Administrators of the Estate of Edward W. Grannis, deceased, and Karl Sloan and William R. Jones, respectfully pray for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit to review the judgment of that Court entered February 3, 1949, reversing a judgment of the District Court entered February 5, 1948, and remanding the case to the District Court with directions to enter judgment for the United States in the sum of $84,710.06. A petition for rehearing filed in the Court of Appeals was denied by said Court on March 7, 1949.

A certified copy of the record in this case, including the proceedings in the Court of Appeals is furnished herewith in accordance with Rule 38 of the Rules of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This suit was brought in the United States District Court for the Eastern District of North Carolina by the respondent, the United States of America, against the petitioners, Edward W. Grannis, Karl Sloan and William R. Jones, to recover double damages and penalties for the alleged filing of false claims by the defendants with the respondent. The proceeding was brought under the provisions of Sections 3490 and 5438 of the Revised Statutes (Title 31 U. S. C. §231). The case was tried before a jury on January 19, 1948 to February 5, 1948. Although the complaint alleged individual violations of the statutes involved, the Trial Court submitted the case to the jury on the issue of conspiracy alone, since at the opening of the trial both counsel for the Government and the Court stated that it was was a conspiracy case. (R. 47, 67). Judgment was entered by the District Court in favor of the defendants after a favorable jury verdict (R. 49). Motions for judgment notwithstanding the verdict or in the alternative for a new trial, were filed by the United States on February 13, 1948 and denied by the Trial Court on March 23, 1948 (R. 50, 58). The respondent appealed to the Court of Appeals for the Fourth Circuit, which reversed the judgment of the Trial Court and ordered the case remanded, with directions to enter a judgment for the United States in the sum of $20,000.00 penalties and in addition the sum of $64,710.06, representing double the amount of damages found by the Court of Appeals to have been sustained by the Government, or a total of $84,710.06, together with the cost of suit

(R. 106). Although the respondent had claimed an additional 130 penalties (treating the listing of each vehicle involved as a separate act) the Court of Appeals limited the number of penalties to 10 (representing the 10 payment vouchers filed).

After the respondent had perfected an appeal to the Court of Appeals for the Fourth Circuit and before argument of the case, the defendant, Edward W. Grannis, was killed in an airplane accident on September 10, 1948. The respondent took appropriate steps in the Court of Appeals to have the record opened and substitute for the defendant, Edward W. Grannis, the Administrators of his estate. Counsel for Edward W. Grannis and the Administrators of the Estate of Edward W. Grannis, deceased, upon notice, timely moved in the Court Appeals for dismissal of the appeal against Edward W. Grannis, deceased, or in the alternative to affirm the judgment of the court below with respect to Edward W. Grannis on the grounds that the action was penal in nature or at least partially so, and had therefore abated as against Edward W. Grannis, deceased, by reason of his death on September 10, 1948 (R. 89).

Edward W. Grannis was one of the prime contractors for the construction of Camp Davis in North Carolina, an anti-aircraft training center for the United States Army (R. 2). Grannis and his co - adventurers, Mr. Higgins, Mr. Thompson and McDevitt Company on December 10, 1940 had obtained a contract No. W-6826-QM-2 with the War Department Quartermaster Corps which was then in charge of construction for the United States Army (R. 2). In connection with the obtaining of this contract, the prime contractors were required to list equipment owned by them which they had available for the job (R. 113). Mr. Grannis listed certain items of equipment, and based upon his representations and the Government's estimate as to his ability to accomplish the job,

the contract was awarded to Grannis and his co-adventurers (R. 113). Under the terms of this contract the prime contractors were required to rent equipment necessary for the job from third parties. None of these prime contractors were required to purchase additional equipment to service construction. Under the terms of third party rental agreements made by the prime contractors, third party contractors were not required to obtain cash or trade discounts allowances or rebates and pass along the benefit of such arrangements to the Government (R. 65). With respect to any supplies or equipment obtained by the prime contractors such prime contractors were naturally required to pass along the benefit of any cash or trade discounts allowances or rebates to the Government (R. 4). Under the terms of both prime contractor rental agreements and third party rental agreements, the Government was entitled to recapture or acquire title to equipment upon the payment of rentals to the amount of the agreed value of the equipment plus 1% a month (R. 63, 65). In view of the difference between the two types of contracts a third party renter was able to receive more money in rentals and upon recapture than a prime contractor who rented equipment to the Government. It is the difference between these two amounts with respect to 130 automobiles which the Court of Appeals found that the Government had been damaged.

Prior to the time Grannis entered into his contract with the Government with respect to Camp Davis, he owned "several hundred thousand dollars" in equipment leased on third party rentals in the construction of Fort Bragg at Fayetteville, North Carolina, which was known to the United States Government at the time he entered into the contract with respect to Camp Davis (R. 102). The defendant, W. R. Jones is the brother-in-law of Edward W. Grannis, deceased, and conceived the idea of purchasing equipment to be used on third party rentals at

Camp Davis. Jones was then employed by Loving and Company which was in charge of construction at Fort Bragg. Since Jones was occupied during the business day with his job at Fort Bragg, he obtained the services of Karl Sloan, a partner of the defendant Grannis, in procuring loans for him (Jones) at the local banks in Fayetteville, North Carolina in order to obtain sufficient money to purchase motor vehicles which were urgently needed on the job at Camp Davis (R. 116). The banks not only required as security chattel mortgages on the vehicles purchased, but also required a guaranty of the loans from Mr. Grannis or his partnership. Arrangements were also made that Sloan would handle the accounts at the two banks involved and Jones would not be permitted to sign checks on the accounts although the account was in his name. This arrangement was made to make sure that the rentals received from the Government were applied to pay off the loans to the bank and to assure that the loans were used in the purchase of motor vehicle equipment for use at Camp Davis (R. 117).

The defendant Grannis had attempted to interest local automobile dealers in renting equipment for use at Camp Davis. All of these dealers refused, since they were unwilling to take the risk of the certain damages which would result to such equipment because of the sandy and damp character of the terrain. Since most of these automobile dealers knew that Mr. Grannis was one of the prime contractors for the construction of Camp Davis, they naturally notified him of the availability of motor vehicles in the vicinity. Since the defendant Grannis was required to see that only usable equipment was delivered at the site of Camp Davis, both he and army officers inspected a portion of the equipment ultimately purchased by Jones and placed on third party rentals at Camp Davis. Either Grannis or Sloan arranged for the delivery of a total of 130 cars and trucks to Camp Davis for

use on the job which were purchased by the defendant Jones. Title to these automobiles was registered in the name of Jones; Jones executed the chattel mortgage on each vehicle; and Jones certified that he was the owner thereof in connection with the third party rental agreement which he entered into with the prime contractors on December 23, 1940 (R. 6, 65). This contract was approved by representatives of the Government at Camp Davis (R. 75). Certain fleet discounts amounting to $1,541.00 were obtained from the Ford Motor Company in the name of Edward W. Grannis with respect to 54 Ford trucks and automobiles. There was no evidence produced at the trial which showed that this money was actually paid to the defendant Grannis or that the defendant Jones did not receive the benefit of this rebate, even though it had been applied for in the name of the defendant Grannis (R. 66).

Under the terms of the third party rental agreement 125 of these vehicles were recaptured and title passed to the United States Government. Under the terms of third party rental agreement, as interpreted by Government witnesses and written communications from the Quartermaster Corps during the existence of the contract, Jones was permitted to use replacement value or cost new in determining the basis for rental and was not required to list the values for rental purpose of the actual amount which he paid for such vehicles (R. 62, 63). All of these vehicles were paid for out of the loans obtained from the local banks. The rental payments which the vehicles later produced were applied to pay off the loans and the profit resulting to Jones was reported in his Federal income tax returns for the years involved (R. 70). There was no evidence introduced at the trial that either Grannis or Sloan profited by these arrangements. In fact, a Government witness testified that neither Grannis nor Sloan benefited personally (R. 71). When this case was inves-

tigated by agents of the Bureau of Internal Revenue these defendants cooperated in every way possible and made all their records available to such agents. The chief investigator testified that he found "nothing wrong" with the arrangements which these defendants had made (R. 71).

The civil action here involved is the aftermath of a criminal prosecution brought by the United States Government against these same defendants under Section 5438 of the Revised Statutes (R. 61). At the criminal trial these defendants were found not guilty under the statute. All of these defendants took the stand in the criminal trial and testified, offering evidence in their own behalf (R. 110). In the trial of this civil case, since the evidence produced by the Government was contradictory and apparently was not leading to the establishment of guilt under the statute necessary for a civil recovery, the defendants and their counsel made the decision that it would be unnecessary for the defendants to take the stand or offer testimony in their own behalf. At this time counsel for the defendants were well aware of the North Carolina practice which permits to the defendants the closing address to the jury where they have not introduced evidence in their own behalf. The defendants and their counsel's estimate of the case was borne out by a verdict in their favor by the jury and the fact that the Trial Court did not upset the jury findings.

In the opinion of the Court of Appeals for the Fourth Circuit, it is stated "The unfavorable inferences against these defendants, which are justified by these facts, are fortified beyond all reasonable doubt by the failure of the defendants either to testify themselves or to offer any testimony on their own behalf" (R. 103). In other words, the Court of Appeals used the failure of the defendants to take the stand in this case as proof beyond all reasonable doubt that the defendants were guilty of fraud upon the United States Government. The opinion also states that

even if Jones technically owned the cars involved, fraud would be established since Jones enjoyed a substantial profit without actual risk or effort on his part, and that it was fraud not to disclose to Government agents these facts, in view of Grannis's promise to use his best efforts to subserve the interest in the Government in the performance of his prime contract (R. 102). This assumes that both Jones and Sloan were familiar with the provisions of Grannis's contract with the Government and would be able to anticipate the interpretation which the Court of Appeals for the Fourth Circuit put upon this contract. There was no evidence produced at the trial from which the Court of Appeals could find either that Jones or Sloan were aware of the provisions of the Grannis contract and certainly it was impossible to anticipate the interpretation of such contract by the Court of Appeals.

It is apparent from the opinion of the Court of Appeals that it assumed there was no conflict in the evidence (R. 101). This assumption is incorrect since in many instances testimony of Government witnesses is inconsistent with the findings of the trial court. For example five auto dealers upon cross-examination testified either that their cars were "sold" to Jones or that titles to the cars upon sale were issued in the name of Jones or that their cars were paid for by a check issued in the name of Jones (Trial Tr. 175, 183, 190, 222, 231).

The Court of Appeals treated the motion of petitioners to dismiss the appeal on the grounds that the action against the deceased defendant Grannis had abated by reason of his death as a "special defense" (R. 103). Relying upon *United States ex rel Marcus* v. *Hess* (1943) 317 U. S. 537; 87 L. Ed. 443, the Court of Appeals held that the civil action under the False Claims Statute is remedial in nature and is not a penal statute and that there was no abatement of the action, *in toto* or partially, as against the defendant Grannis by reason of his death (R. 103, 104).

JURISDICTION

This suit arises under the False Claims Statute, Sections 3490 and 5438 of Revised Statutes (Title 31 U. S. C. §231).

The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254 (1).

The District Court rendered no opinion and merely entered judgment on the verdict and an order denying respondent's motion for judgment notwithstanding the verdict or in the alternative a new trial (R. 49, 58).

The opinion of the Court of Appeals is reported at 172 F. (2d) 507.

QUESTIONS PRESENTED

1. Did the Court of Appeals deprive these defendants of their right to trial by jury preserved to them under the provisions of the Seventh Amendment to the Constitution of the United States, since that Court apparently found these defendants guilty of individual violations of the Statute when the case was tried solely on the conspiracy issue in the Trial Court?

2. Did the Court of Appeals deprive these defendants of their right to trial by jury preserved to them by the Seventh Amendment to the Constitution of the United States, since there was evidence produced at the trial by Government witnesses upon which a verdict in favor of the defendants could be based?

3. Does the Court of Appeals have power to direct the entry of judgment in favor of the plaintiff where reasonable men could draw a different conclusion from the evidence produced at the trial?

4. Did the Court of Appeals err in holding that the failure of these defendants to take the stand and testify in their own behalf or offer testimony proves beyond all reasonable doubt their guilt under the Statute?

5. Does the Court of Appeals have power to direct a judgment for the Government under the False Claims

Statute where the Court of Appeals has failed to make an express finding that each defendant had knowledge that the claims were false when filed?

6. Did the Court of Appeals err in holding that the action with respect to the defendant Grannis did not abate *in toto* or partially, by reason of his death after judgment and verdict in his favor in the Trial Court and appeal to the Court of Appeals?

REASONS FOR GRANTING THE WRIT

Your petitioners respectfully pray that the Writ be allowed for the following reasons:

1. The decision of the Court of Appeals for the Fourth Circuit is out of harmony and in conflict with the decision of this Court in *General Utilities and Operating Company v. Helvering* (1935) 296 U. S. 200; 80 L. Ed. 154, in that the opinion of the Court of Appeals in effect holds these defendants guilty of individual violations of the Statute although the case was tried in the court below solely on the question of conspiracy.

2. The decision of the Court of Appeals for the Fourth Circuit is out of harmony and in conflict with *Slocum v. New York Life Insurance Company* (1913) 228 U. S. 364; 57 L. Ed. 879; *Cf. Baltimore & Carolina Line v. Redman* (1935) 295 U. S. 654; 79 L. Ed. 1636; *Aetna Insurance Company v. Kennedy* (1937) 301 U. S. 389; 81 L. Ed. 1177, in that it deprives these defendants of their right to trial by jury since there was some evidence upon which verdict and judgment could be rendered in their favor.

3. The decision of the Court of Appeals for the Fourth Circuit is out of harmony and in conflict with the decisions of this Court in *Gunning v. Cooley* (1930) 281 U. S. 90; 74 L. Ed. 720 and *Richmond & Danville Railroad Company v. Powers* (1893) 149 U. S. 43; 37 L. Ed. 642 in that its opinion was to the effect that the defendants were guilty of fraud beyond all reasonable doubt even

though reasonable men could draw a contrary conclusion from the evidence produced at the trial.

4. The decision of the Court of Appeals for the Fourth Circuit is out of harmony and in conflict with the decisions of this Court in *Chaffee* v. *United States* (1874) 85 U. S. 516; 21 L. Ed. 908 (See also *Lilienthal* v. *United States* (1878) 97 U. S. 237, 271; 24 L. Ed. 901, 907) in that its opinion holds that the failure of these defendants to take the stand and testify in their own behalf or offer testimony establishes beyond all reasonable doubt their guilt under the Statute.

5. The Court of Appeals for the Fourth Circuit has misinterpreted the decision of this Court in *United States ex rel Marcus* v. *Hess, supra,* in that it held that this Court's discussion with respect to the plea of double jeopardy is controlling as to the decision whether the federal statutes authorize the survival of actions for civil damages which are penal in nature. In this respect the Court of Appeals has incorrectly decided an important question of federal law which has not been, but should be, settled by this Court.

6. No where in the opinion of the Court of Appeals for the Fourth Circuit is there a finding that all of these defendants knew the claims were false when filed nor is there a finding that all three of these defendants conspired to file the ten different claims which the Court of Appeals found to be false.

7. The Court of Appeals for the Fourth Circuit in usurping the function of the jury and finding facts which the jury in the case did not find has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the

Fourth Circuit, commanding the said Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, as provided in the Statutes of the United States, that the judgment of the Court of Appeals be reversed and the judgment of the District Court be affirmed and that petitioner be granted such other and further relief as may seem proper.

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April 14, 1949

BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

The facts insofar as this application is concerned are sufficiently stated in the Petition.

SPECIFICATION OF ERRORS

For the errors which petitioners will urge if the Writ of Certiorari is granted, the Court is respectfully referred to that part of the petition which sets forth the questions presented (P. 9, 10) and to that part which states the reasons why the Writ should be granted (P. 10, 11).

SUMMARY OF ARGUMENT

I. These petitioners have been deprived of their right to a trial by jury, preserved to them under the Seventh Amendment of the Constitution of the United States, since the Court of Appeals for the Fourth Circuit has, in effect, held these defendants guilty of individual violations of the False Claims Statute although they were tried in the court below only on the theory of conspiring to file false claims and obtain payment from the Government thereon.

II. These petitioners have been deprived of their right to a trial by jury preserved to them under the Seventh Amendment of the Constitution of the United States since there was evidence produced at the trial upon which reasonable men could have and did find a verdict in their favor.

III. The Court of Appeals erred in holding as a matter of law that the failure of these petitioners to take the stand or offer testimony in their own behalf was evidence of guilt under the False Claims Statute.

IV. The Court of Appeals is without power to enter a judgment in favor of the respondent in this case since

that Court did not find as a fact either that all of these petitioners knew the claims were false when filed or that the defendants conspired to file claims, knowing them to be false.

V. The Court of Appeals has incorrectly decided an important Federal question with respect to the abatement of causes of action under the False Claims Statute by reason of the death of an alleged conspirator or an alleged actor in the filing of false claims. This question has not been, but should be settled by this Court.

ARGUMENT

I. *These petitioners are entitled to a trial by jury on the question of whether they were guilty as individuals under the False Claims Statute.*

The record fully discloses that at all times these petitioners have asserted their right to a trial by jury. Early in the trial of the case the petitioners were put on notice that the case was being tried solely on the question of conspiracy. This notice was given both by counsel for the respondent at the trial and the District Judge conducting the trial. Although the complaint alleged individual violations of the Statute, it was assumed by counsel for the petitioner that they could rely on the statement of counsel for respondent and the Court. Further, the evidence being produced could logically support only a charge of conspiracy to violate the Statute, since there could be falsity in the claims only in the event defendant Jones was not the owner of the equipment involved. It is true that counsel for respondent at the appropriate time tendered issues to the Judge to be submitted to the jury on the question of individual violation of the False Claims Statute by petitioners. This step, however, was taken subsequent to the time when the defendants rested their case. This attempted revival of a previous theory concerning

the case was not permitted by the Trial Court since it submitted to the jury solely the question of conspiracy under the Statute.

The opinion of the Court of Appeals fails to indicate whether that Court believed that the evidence conclusively established a conspiracy or whether that Court believed that the evidence conclusively established violations of the Statute by the petitioners as individuals and not as actors in a conspiracy. It is apparent that the effect of the Court's opinion is to hold that these defendants were individually guilty of violations of the Statute. Certainly these petitioners should be entitled to put whatever evidence they may have before a jury if the case is to be tried on the theory of individual violations of the Statute. It would seem apparent that if these petitioners are to be tried upon a different theory of the case in an appellate court, they are being deprived of their right to a trial by jury which is preserved to them by the provisions of the Seventh Amendment to the Constitution of the United States.

It has been held that a United States Court of Appeals was in error in reversing a judgment of the Board of Tax Appeals upon a point which was not presented to or argued before that Board. See *General Utilities and Operating Company v. Helvering* (1935) 296 U. S. 200; 80 L. Ed. 154. That case involved a Writ of Certiorari to the Court of Appeals for the Fourth Circuit which had recognized the correct principle of law but had believed it inapplicable to the case then considered. The Court of Appeals stated the rule in that case (74 Fed. (2d) 972) at page 976 as follows:

> "The reason for the rule, some times enforced by the courts, that an appellate court will confine itself to the issue presented and ruled upon by the court below, is based on the ground that the opposing party has no opportunity to re-

sist the new issue by amendment of the pleadings *or by additional proof.*" (Italics supplied).

Certainly these petitioners should not be deprived of their right to put in additional proof before a jury to contradict any evidence which might heretofore have been produced which would lead to the inference of guilt of individual violations of the False Claims Statute. Certainly it cannot be said that they have already been provided with this opportunity and have already enjoyed their day in court.

II. *These petitioners are entitled to a trial by jury under the provisions of the Seventh Amendment to the Constitution of the United States since reasonable men could have and did find in their favor from the evidence produced at the trial.*

In *Slocum v. New York Life Insurance Company* (1913) 228 U. S. 364; 57 L. Ed. 879, it was held that the action of the Court of Appeals for the Third Circuit in reversing a judgment for the plaintiff and directing the entry of a judgment of dismissal on behalf of the defendant was an infraction of the Seventh Amendment of the Constitution. In that case this court stated at 379, 380, 381 as follows:

> "These decisions make it plain, first, that the action of the circuit court of appeals in setting aside the verdict and assuming to pass upon the issues of fact, and to direct a judgment accordingly, must be tested by the rules of the common law; second, that while under those rules that court could set aside the verdict for error of law in the proceedings in the circuit court, and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said

that there was not an infraction of the 7th Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the circuit court of appeals itself determined the facts, without a new trial. Thus, it assumed a power it did not possess, and cut off the plaintiff's right to have the facts settled by the verdict of a jury."

* * * * *

"And this procedure was regarded as of real value, because in addition to fully recognizing that right, it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity, and for anything that appears in the record *it may enable her to supply omissions in her own evidence, or to show inaccuracies in that of the defendant, which will rightly entitle her to a verdict and judgment in her favor.*"

It may be noted, however, that this Court in *Baltimore & Carolina Line v. Redman* (1935) 295 U. S. 654; 79 L. Ed. 1636, held that the *Slocum* case *supra* did not prevent a court of appeals from directing the entry of judgment in favor of the plaintiff upon reversal of a judgment in the plaintiff's favor where there had been a reserved decision on a motion for a directed verdict made by the defendant, if it appeared that the evidence was insufficient to support the allegations contained in the complaint. It is clear that the *Redman* case can have no application to

the case at bar since here there is evidence upon which reasonable men could have found that the defendants were not guilty of conspiring to file false claims against the Government. In *Aetna Insurance Company v. Kennedy* (1937) 301 U. S. 389; 81 L. Ed. 1177, it was held by this Court that in the absence of motions for judgments notwithstanding the verdict, the Court of Appeals for the Third Circuit was without power to reverse judgments in favor of defendants and to direct judgments for the plaintiff. Although it may be reasonable to assume that this Court would have come to a contrary opinion in the *Aetna Insurance Company* case *supra* in the event there had been motions for judgment notwithstanding the verdict, it is believed that such case has no application to the case at bar since there was sufficient evidence to support the findings of the jury in this case.

It is believed that the testimony of Government witnesses that the vehicles involved had been sold to Jones, that registration of the vehicles with the State authorities had been made in the name of Jones, that Jones had executed chattel mortgages on these vehicles in favor of the banks, that the banks charged Jones with liability for the loans made to purchase the vehicles, that the bank accounts were carried in the name of Jones, that Jones reported all the income from rental transactions, that neither Grannis nor Sloan profited personally by the arrangements, that Government investigators found nothing wrong with the arrangements, are all facts upon which a jury composed of reasonable men could find that Jones was the owner of these vehicles and that these defendants were therefore not guilty under the False Claims Statute.

In *Gunning v. Cooley* (1930) 281 U. S. 90; 74 L. Ed. 720, this Court affirmed a decision of the Court of Appeals of the District of Columbia which had affirmed a judgment in favor of the plaintiff rendered after verdict in her favor in a suit brought to recover damages by reason

of the defendant's negligence in treating the plaintiff for an ear ailment. In that case this Court stated at page 94:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury."

See also *Richmond & Danville Railroad Company* v. *Powers* (1893) 149 U. S. 43; 37 L. Ed. 642. It is clear in the case at bar that the Court of Appeals has usurped the function of the jury and in this respect has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

III. *The Court of Appeals erred in holding that as a matter of law the failure of these petitioners, in a suit charging fraud, to take the stand or offer evidence in their own behalf was evidence of guilt.*

In *Chaffee v. United States* (1874) 85 U. S. 516, 21 L. Ed. 908, this Court reviewed the instruction of a trial court to the jury in an action in debt to recover a penalty provided by the Revenue Act of June 30, 1864 against the defendants for having in their possession certain distilled spirits for the purpose of sale with the design to avoid the duties imposed thereon. In discussing the instruction there under consideration, this court said at pages 545, 546:

> "The purport of all this was to tell the jury that, although the defendants must be proved guilty beyond a reasonable doubt, yet if the government had made out a prima facie case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other

> words, the court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt."
>
> "* * * * * * * * The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection — the right to refuse to testify — into the machinery for their sure destruction."

In distinguishing and explaining the holding in the *Chaffee* case *supra* this Court said of the *Chaffee* case in *Lilienthal* v. *United States* (1878) 97 U. S. 237; 24 L. Ed. 901 at page 271 as follows:

> "Instructions of an entirely different character were given in that case; as, for example, the jury were told in effect that suspicious circumstances requiring explanation, if not explained, would supply by presumption what would be sufficient to warrant a verdict of guilty; that silence supplied, in the presumption of law, that full proof which should dispel all reasonable doubt, *making the inference to be drawn from silence one of law instead of fact.*" (Italics supplied).

It is clear from both the *Chaffee* case and the *Lilienthal* case above that the failure of defendants to take the stand and testify or offer testimony in their own behalf *can* or *may* raise an unfavorable inference against them. It is equally clear that it is error for a court to hold that such

inference must be drawn as a matter of law. It is believed that the opinion of the Court of Appeals in this case recognized the fact that a jury could draw an inference of guilt from the defendants' failure to take the stand or offer testimony in their own behalf, yet in the same opinion the Court said that such failure proved "*beyond all reasonable doubt*" that unfavorable inferences against the defendants had to be drawn. In other words, the Court of Appeals apparently held that as a matter of law guilt could be presumed from the failure of the defendants either to testify themselves or offer any testimony in their own behalf.

While perhaps it may be held that unfavorable inferences may be drawn from the failure of the defendants to testify, it is believed that such unfavorable inferences may not be drawn in this case for the following three reasons:

1. All three of these defendants had taken the stand and testified in their own behalf in a previous criminal trial under an indictment charging the same acts which form the basis of the alleged liability in this case and had been vigorously cross-examined then by government counsel. A transcript of that examination had been in possession of counsel for the respondent in this case and all of the information there obtained was available to such counsel during the course of the trial of this case.

2. Counsel for petitioners were well aware of the North Carolina State practice which permits defendants to have the closing argument before the jury where they offer no testimony or evidence on their own behalf. This practice was vigorously criticized in the opinion of the Court of Appeals for the Fourth Circuit in this case, but at best it could be held to be prejudicial error which would require a new trial and certainly cannot be grounds for the direction of a judgment in favor of the respondent.

3. The defendants were certainly entitled to rely upon the weakness of the Government case and the apparent inconsistencies of the testimony of Government witnesses.

IV. *These defendants may not be charged with liability under the False Claims Statute without a finding that all of the defendants knew the claims were false when filed or conspired to file false claims.*

It is apparent that the claims involved in this case could be false only in the event the petitioner, Jones, was not the owner of the property involved. Nowhere in the opinion of the Court of Appeals is there an express finding of knowledge or *scienter* on the part of all of the defendants. It would appear unnecessary to cite authority that guilty knowledge is a necessary ground for an action based upon fraud. It is clear that fraud or deceit is a *sine qua non* of liability under the False Claims Statute. See *United States ex. rel. Brensilber v. Bausch & Lomb Optical Company* (C. A., 2, 1942) 131 F. (2d) 545, affirmed by an equally divided Supreme Court (1943) 320 U. S. 711; 88 L. Ed. 417, reh. den. (1943) 320 U. S. 814; 88 L. Ed. 492. See also *Cahill v. Curtiss-Wright Corporation* (D. C., Ky. 1944) 57 F. Supp. 614.

V. *The cause of action against the deceased defendant Grannis under the statute abated by reason of his death after verdict and judgment in his favor and perfection of appeal by the respondent to the Court of Appeals for the Fourth Circuit.*

It is respectfully submitted that the Court of Appeals has interpreted language employed by this Court in the case of *United States ex rel Marcus v. Hess* (1943) 317 U. S. 537; 87 L. Ed. 443, and used in connection with a decision as to the pleas of double jeopardy, to be applicable in the determination of whether a civil action which authorizes the award of damages which are penal in nature survives the death of a defendant in such suit. It is believed that the Court of Appeals was contrasting penal or criminal actions with civil actions in reaching a determination as to survivability, instead of properly contrasting civil actions for remedial damages and civil actions

for damages which are penal in nature. In any event, it is respectfully submitted that the case of *Marcus* v. *Hess*, *supra*, does not decide the issue in the case at bar and that the Court of Appeals has incorrectly decided an important question of federal law which has not been passed upon, but should be settled, by this Court. Counsel for petitioners have been advised by counsel for respondent that there are presently pending approximately 969 investigations of violations under the False Claims Statutes. Individuals being investigated are certain to die and the question presented by this case may arise. Counsel for petitioners have been further advised that in addition to the cases under investigation approximately 85 cases are in litigation but that this is the only case in which the question of abatement upon death has been raised.

CONCLUSION

This is a case which merits consideration of this Court. It is respectfully urged that a Writ of Certiorari be issued herein.

Respectfully submitted,

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